

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 77-4005

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4005, 77-4020, 77-4059

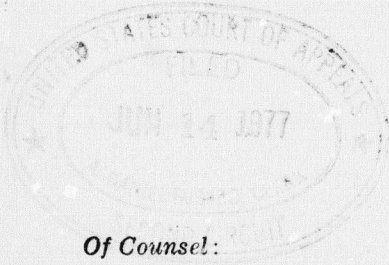
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order
of the Federal Communications Commission

**BRIEF FOR PETITIONER INTERNATIONAL
BUSINESS MACHINES CORPORATION**



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BRIEF FOR PETITIONER INTERNATIONAL
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QUESTIONS PRESENTED

Under rules of the Federal Communications Commission communications common carriers may offer data processing equipment and services only on an unregulated basis and not under Commission tariff. AT&T proposed tariffing the Dataspeed 40/4, a device whose operation and capability are closely similar to those of devices provided on an unregulated basis by manufacturers of data processing equipment for use in data processing systems. The Dataspeed 40/4 interacts with a central data processing unit ("CPU") in a data processing system and is

incapable of use except with a CPU and upon command of a CPU. The Dataspeed 40/4 performs at a remote location functions which in the past were performed in the CPU itself. Petitioners sought rejection, or in the alternative, suspension and investigation, of the Dataspeed 40/4 tariff on the ground, *inter alia*, that it is a data processing device not subject to regulation under the Commission's rules and policies.

The questions presented are:

1. Was it error for the Federal Communications Commission to decline to reject the AT&T Dataspeed 40/4 tariff?

2. If the Commission acted within its discretion in declining outright rejection of the proposed tariff, did it nevertheless err in failing without explanation to suspend the tariff and conduct an investigation to determine its lawfulness?

REFERENCE TO RULING

The ruling of the Federal Communications Commission ("Commission") under review in this case is a Memorandum Opinion and Order released January 5, 1977 (FCC-1199). *American Telephone and Telegraph Co. Revisions to Tariffs F.C.C. Nos. 260 and 267 Relating to Dataspeed 40* (Transmittal No. 12449), 62 F.C.C. 2d 21 (1977), III J.A. 969 ("Dataspeed 40/4 Order").

STATUTES INVOLVED

Section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(b), provides in pertinent part:

"All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable and any such charge, practice, classification, or regulation that is

unjust or unreasonable is declared to be unlawful.
 . . ."

Section 204 of the Communications Act of 1934, as amended, 47 U.S.C. § 204, provides in pertinent part:

"Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period"

STATEMENT OF THE CASE

This is a petition by International Business Machines Corporation ("IBM") to review a Memorandum Opinion and Order of the Federal Communications Commission ("Dataspeed 40/4 Order") permitting AT&T to offer as a communications common carrier service under Commission tariff, a device called the "Dataspeed 40/4." AT&T is currently providing the Dataspeed 40/4 under a tariff filed pursuant to the Order under review.

Historical Background of the Proceeding

The Commission's Decision in "Computer Inquiry I"

In 1965, the Commission commenced a comprehensive rulemaking proceeding—"Computer Inquiry I"¹—to study regulatory and policy questions raised by the increasing convergence of the "communications" field, which was subject to Commission regulation, and the "data processing" field, which had grown up and flourished in a competitive environment free from regulation.² After a lengthy and thorough proceeding, the Commission reached two fundamental policy conclusions:

First, the Commission should not regulate the data processing industry and should not require or permit the offering of data processing services under Commission tariff;³ and

Second, communications common carriers should be permitted to offer data processing services but only through separate corporate affiliates on an unregulated basis (the "maximum separation" rule).⁴

¹ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities* (Docket No. 16979), Tentative Decision of the Commission, 28 F.C.C.2d 291 (1970) ("Tentative Decision"), modified, 28 F.C.C.2d 267 (1971) ("Final Decision"), *aff'd in part and rev'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973). Section 64.702 of the Commission's Rules, 47 C.F.R. § 64.702, was promulgated pursuant to this proceeding. In this brief, we refer to the proceeding as "Computer Inquiry I."

² *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (Docket No. 16979), Notice of Inquiry, 7 F.C.C.2d 11 (1966).

³ Tentative Decision, 28 F.C.C.2d at 297-98.

⁴ *Id.* at 302-04.

The Commission based its policy of non-regulation of data processing on its determination that regulation simply was not needed in, and indeed could prove harmful to, the highly competitive, technologically innovative data processing industry. The Commission reasoned as follows:

"... In this country we rely upon the 'free enterprise' system Government intervention and regulation are limited to those areas where there is a natural monopoly, where economies of scale are of such magnitude as to dictate the need for a regulated monopoly, or where such other factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists.

"Applying these standards to the record before us we conclude that *the offering of data processing services is essentially competitive and that . . . there is no public interest requirement for regulation by government of such activities.* Thus, there is ample evidence that data processing services of all kinds are becoming available in larger volume and that there are no natural or economic barriers to free entry into the market for these services. The number of data processing bureaus, time sharing systems, and specialized information services is steadily increasing and there are no indications that any of these markets are threatened with monopolization."⁵

The Commission promulgated the "maximum separation" rule to ensure that the risks and costs of a regulated common carrier's data processing ventures would not, as a result of commingling, be borne by its common carriage users.⁶ The Commission found that such com-

⁵ *Id.* at 297 (emphasis added); see Final Decision, 28 F.C.C.2d at 270.

⁶ Tentative Decision, 28 F.C.C.2d at 299.

mingling would adversely affect the carrier's ability to provide economic and efficient common carrier services to the public.⁷

Computer Inquiry I established a "primary purpose" test for determining when an offering that involves data processing or "hybrid data processing"⁸ is subject to the "maximum separation" rule.⁹ The Commission defined "data processing" as

"the use of a computer for the processing of information as distinguished from circuit or message-switching.¹⁰ 'Processing' involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging, and calculating data, according to programmed instructions." Rule 64.702(a)(1), 47 C.F.R. § 64.702(a)(1).

A "remote access data processing service" is defined as "an offering of data processing wherein communications facilities, linking a central computer to remote

⁷ *Id.* at 299, 301-02; Final Decision, 28 F.C.C.2d at 269, 273.

⁸ Section 64.702(a)(5) of the Commission's Rules, 47 C.F.R. § 64.702(a)(5) (1976) pertaining to "hybrid services" provides the following definitions:

"'Hybrid service' is an offering of service which combines remote access data processing and message-switching to form a single integrated service.

"(i) 'Hybrid data processing service' is a hybrid service offering wherein the message-switching capability is incidental to the data processing function or purpose.

"(ii) 'Hybrid communication service' is a hybrid service offering wherein the data processing capability is incidental to the message-switching function or purpose."

⁹ Tentative Decision, 28 F.C.C.2d at 305.

¹⁰ Section 64.702(a)(2) of the Commission's Rules, 47 C.F.R. § 64.702(a)(2), defines "message-switching" as:

"The computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered."

customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals." Rule 64.702(a)(4), 47 C.F.R. § 64.702(a)(4).

In *GTE Service Corp.*,¹¹ this Court reviewed a number of the rules promulgated in *Computer Inquiry I*. The Court upheld the rules it found responsive to the Commission's legitimate concern that regulated carriers provide the public with efficient and economic telephone service. 474 F.2d at 730-32. The Court struck down as beyond the Commission's jurisdiction those *Computer Inquiry I* rules whose purpose was to enhance competition in the data processing industry. *Id.* at 732-36. The Court held:

"[The Commission's] concern here therefore is not for the communications market which Congress has entrusted to its care, but for *data processing which is beyond its charge* and which the Commission itself has announced it declines to regulate. We find the intrusion to be without authority either in the Communications Act or in the cases construing it." *Id.* at 733 (footnote omitted; emphasis added).

Technological and Historical Developments in the Data Processing Field

Each of the following interdependent functions is performed in a data processing or computer system:

- (1) input—the translation of information from human language into a language the system can understand and entry of the information into the system;
- (2) processing—the performance of logical operations and calculations on the information;
- (3) storage—the commitment of the information to the system's information depository;

¹¹ See note 1 *supra*.

(4) output—the translation of information from machine to human language and return of the information from the system; and

(5) control—the control of the time and order in which the different parts of the system and the devices which contain those parts perform the first four functions.¹²

During the early stages of computer systems in the 1950's, all five of these functions were generally performed at a central site. Since that time, major technological developments have permitted the removal of these functions from the CPU and their geographical distribution among some or all of the "remote" locations in a system interconnected by communications lines.

Remote access data processing systems initially used conventional teletypewriters at remote sites to transmit data over common carrier communications lines to and from the CPU, and to perform the input and output

¹² Data processing systems consist of electronically interconnected functional elements (called "hardware") operating in conjunction with or under the control of a set of electronic instructions (called "software"). These functional elements are not independently useful—they must operate in what is called a data processing "system."

The five functions in a system can be contained in and performed by one or several "boxes," in a multitude of varying combinations of hardware and software. When the functions are distributed among a number of boxes, the center of the data processing system is referred to as the "central processing unit," the other hardware as peripheral equipment. The CPU, with software, performs the primary control function and processing. Peripheral boxes store information, perform processing and control functions, and provide the means for users to "input" information or data into a computer system and to receive intelligible "output" from the system. See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (Docket No. 16979), Response of International Business Machines Corporation (March 5, 1968), at II-1-2; *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 899 (10th Cir. 1975), *petition for cert. dismissed*, 423 U.S. 802 (1975).

functions. As remote access data processing applications became more complex and user needs more extensive, conventional teletypewriters were replaced in many instances with more versatile and powerful devices.¹³ These remote devices perform in various degrees and combinations the processing, storage, input, output and control functions once performed solely at the central site. Many of these devices—unlike conventional teletypewriters—are useful exclusively in data processing systems. Typically, these devices can be located either at the CPU site, in which case an ordinary cable connects them to the CPU, or at a remote location, in which case the device is linked to a CPU (offered by the same or another company) by common carriage lines.

For example, IBM offers a family of devices called the IBM 3270 Information Display System, which is useful only in conjunction with a CPU as part of a data processing system.¹⁴ The IBM 3270 has certain processing and storage circuits, a typewriter-like keyboard, a cathode ray display tube, and a printer.¹⁵ It performs input, output and some processing, storage and control functions in interaction with a CPU in a data processing system. The following example illustrates how the IBM 3270 performs some of these functions.

One of many data processing operations that the IBM 3270, interacting with a CPU, can perform is the creation and maintenance of order entry records in a cata-

¹³ Conventional teletypewriters are still utilized to perform data processing operations. Indeed, AT&T noted in its application to the Commission for review (at 22, II J.A. 676), that over 60 percent of its teletypewriter installations in 1973 were connected to computers.

¹⁴ See "An Introduction to the IBM 3270 Information Display System," which forms the basis for the discussion in the text that follows this footnote. II J.A. 501.

¹⁵ The cathode ray tube (CRT) resembles a television screen and permits a visual display of information to the operator.

logue or similar point of sale processing application. The IBM 3270 operator depresses the appropriate key on the keyboard. The IBM 3270 converts this signal into computer language but cannot initiate a transmission to the CPU. It must wait until it is "polled" by the CPU (as it is periodically)—in effect questioned as to whether it has a transaction to conduct with the CPU. If it does, the CPU commands transmission and the IBM 3270 complies, thereby performing an input function. The CPU analyzes the information and makes a programmed response, sending data and instructions back to the IBM 3270.¹⁶ The data and instructions are stored in specified places in its memory device—a storage function. The IBM 3270 analyzes the instructions from the CPU and makes its own programmed response. In this case, it displays on its cathode ray tube screen a formatted "sales slip," which was included in the data received from the CPU. The "sales slip" appears in a specifically programmed format with words such as "Customer," "Date," and "Merchandise Purchased" in pre-determined places and spaces for the entry of appropriate information. The IBM 3270's display of its data in accordance with instructions from the CPU is an example of data processing output.

The operator then enters information in the appropriate spaces on the "sales slip" by depressing keys on the keyboard. The IBM 3270, rather than transmitting the sales information directly to the CPU's memory for processing, stores the information in its own memory and enters it in the appropriate spaces in the "sales slip"

¹⁶ The term "programmed response" refers to a response made by either a CPU or a remote device to a given stimulus, which response has been pre-ordained. The "programming" of a response can be achieved in a variety of ways—for example, by providing the CPU and/or remote device with sufficient "intelligence" or "software" to perform a logical operation leading to the desired response; or by constructing or wiring the device in such a way that it can make only the desired response. See page 19 note 43, *infra*.

on the display screen. The operator can make the IBM 3270 edit or correct the information displayed, still without interacting with the CPU. For example, words can be inserted or deleted, and typographical errors can be corrected.

When the sales slip is completed, the operator depresses a key to indicate to the CPU that it has another transaction to conduct, and the IBM 3270 awaits another poll by the CPU. On the CPU's command, the IBM 3270 analyzes the information in its memory and selects those pieces of information (individual letters or digits) that should be transmitted to the CPU for processing. For example, the IBM 3270 does not select the format words such as "Customer" or "Date" but only the information entered in the spaces after those words. In addition, it selects out null or unused spaces between categories or words.

When this selection process is complete, the CPU directs the IBM 3270 to transmit the sales data over communications lines for the final steps of processing: addition of the prices of the merchandise and calculation of the sales tax. The CPU then transmits the results back to the IBM 3270, which again performs several functions. It stores the processed information in its memory, analyzes the CPU's instructions for entering the data on the "sales slip," and converts the data to English for display. If the operator finds the information entered on the "sales slip" satisfactory, the operator can then instruct the IBM 3270 to print an actual sales slip.

Devices such as the IBM 3270 have been offered on an unregulated basis by numerous unregulated companies. According to one authority, there are "at least 96 general purpose alpha-numeric display terminals from 59 manufacturers available today."¹⁷ Competition among

¹⁷ Granholm, *Alphanumeric Display Terminals*, Datamation, January 1976, at 40.

these companies is vigorous, and equipment like the IBM 3270 is available in large volume.

The Dataspeed 40/4

On November 18, 1975, AT&T filed with the Commission proposed tariff amendments that established rates and regulations for the provision by AT&T of the Dataspeed 40/4. The record before the Commission reflects that the Dataspeed 40/4 is virtually identical to the IBM 3270 in operation and capability.¹⁸ The Dataspeed 40/4 consists of processing and storage circuits, a typewriter-like keyboard, a cathode ray display tube, and a printer. It too can be used at the CPU site or at remote locations. According to AT&T, the Dataspeed 40/4 "provide[s] customers with the capability of entering, displaying, editing, printing, sending and receiving data" between it and a CPU.¹⁹ AT&T sales literature states that the Dataspeed 40/4's

"efficient interactive mode of operation will make it extremely attractive for computer input-output applications such as inquiry-response, data entry and data retrieval."²⁰

As the Commission found, the Dataspeed 40/4 does not have the capability of functioning directly with any equipment other than a CPU and consequently cannot be used to send or receive messages directly from one terminal to another.²¹ The Dataspeed 40/4 interacts with

¹⁸ See Synchronous "Dataspeed" 40 System Description, Bell System Practices, Section 582-200-001 Preliminary Copy, 10/30/75, at 16-29, I J.A. 182-84. Like the IBM 3270, the Dataspeed 40/4 is comprised of several different boxes. See *id.* at 39, I J.A. 204.

¹⁹ Attachment to Transmittal No. 12449, "Explanation and Justification for the Filing," (Nov. 18, 1975) at 1, I J.A. 244.

²⁰ Teletype Synchronous Model 40/4 Data Terminals Catalog (ed. Nov. 1975), at 2, I J.A. 209.

²¹ Dataspeed 40/4 Order, 62 F.C.C.2d at 23, III J.A. 971. According to AT&T: "Direct Transmission between the remote stations is not possible" (Synchronous "Dataspeed" 40 System De-

the CPU much like the IBM 3270. The Dataspeed 40/4 cannot initiate a transmission to the CPU but does so only upon the command of the CPU. And it can perform editing operations, as in the example of sales order entry records described above.²²

Like the IBM 3270, the Dataspeed 40/4 has information storage capacity which can be discretely addressed by the CPU for both entry and retrieval of data.²³ In effect, the Dataspeed 40/4's memory becomes an auxiliary memory for the CPU. The Dataspeed 40/4's memory is also used to retain instructions from the CPU regarding formatting or other matters. For example, once the CPU has sent instructions to the Dataspeed 40/4 for the format of a sales order, the Dataspeed 40/4 itself "remembers" this format and insures that any data entered is appropriate for this format and is assigned by the Dataspeed 40/4 to the correct position in the format.

The Dataspeed 40/4 has its own stored instructions distinct from the software of the CPU. The instructions

scription, Bell System Practices, Section 582-200-001 Preliminary Copy, 10/30/75), at 3, I J.A. 168; and "All transmission is either to or from the computer (*i.e.*, there is no direct terminal to terminal transmission of data)" (AT&T Engineering Letter GL: 75-09-150, September 19, 1975, Synchronous DATASPEED 40, at 3, I J.A. 10).

²² "The keyboard permits users manually to enter and edit data and to control the operation of the display. Two new types of keys have been added to the keyboard. The use of these keys is governed by the software in the customer's computer with which the terminals communicate. The keys may be used as a shorthand method for an operator to indicate a special message to the computer. A Program Access Key . . . causes a signal to be sent to indicate which key was depressed. A Program Function Key . . . causes a signal to be sent indicating which key was depressed and sends any data on the display which has been modified by the operator." Attachment to Transmittal No. 12449, at 5, I J.A. 248.

²³ AT&T Engineering Letter GL: 75-09-150, Synchronous Dataspeed 40 (Sept. 19, 1975), at 15-17, I J.A. 22-24.

in the Dataspeed 40/4 enable it to interact with the CPU and to analyze the information entered into it or transmitted from the CPU and to perform certain logical operations to determine which programming response it should make to such information. It can perform the same role as performed by an IBM 3270 in a point of sale processing application.

The functions just described were once performed solely by the CPU. As a consequence of the technological developments discussed above, these functions can now be performed by remote devices such as the Dataspeed 40/4 and the IBM 3270 as an integral part of a data processing system.

Proceedings before the Commission

On December 15, 1975, IBM petitioned the Commission to reject AT&T's proposed Dataspeed 40/4 tariff amendments as unlawful under Section 201(b) of the Communications Act of 1934, or, in the alternative, to suspend the tariff and investigate its lawfulness pursuant to Section 204 of the Act (II J.A. 413).²⁴ IBM contended that the Dataspeed 40/4 was not a communications device which could be provided under Commission tariff, but rather a data processing device which may be provided only on an unregulated basis. The Computer and Business Equipment Manufacturers Association

²⁴ Suspension of a proposed tariff for purposes of conducting an investigation into its lawfulness does not necessarily prevent the proponent of the tariff from offering the proposed service or equipment. Section 204 limits the suspension to a period not longer than "five months beyond the time it would otherwise go into effect. . . ." 47 U.S.C. § 204. If the investigation has not been concluded within that period, the tariff nevertheless goes into effect. If after completing its investigation the Commission concludes that the tariff is unlawful, the tariff is rejected. The Commission often suspends a tariff for only a symbolic one day period where it concludes an investigation is necessary. Such action permits the proponent of the tariff to offer the service or equipment, but at the same time gives notice that the Commission has not finally approved the tariff.

("CBEMA") (II J.A. 397) and the Computer and Communications Industry Association ("CCIA") also filed challenges to the Dataspeed 40/4 tariff (II J.A. 495).²⁵

AT&T filed various material in support of the Dataspeed 40/4 tariff and contended that the Dataspeed 40/4 was merely an evolutionary development of the teletype-writer and that its functions were primarily communications functions. During the course of the proceedings, which were initially conducted on a somewhat informal basis, the parties, intervenors, and other interested persons made various technical, factual, and legal submissions to the Commission.²⁶

On March 3, 1976, the Chief of the Common Carrier Bureau rejected AT&T's Dataspeed 40/4 tariff amendment as "unlawful on its face" and "patently violative of the FCC's rules and policies."²⁷ The Common Carrier Bureau held that the Dataspeed 40/4 was data processing

²⁵ On December 15, 1975, CBEMA filed a petition with the Commission requesting that the Commission reject AT&T's Dataspeed 40/4 tariff amendments; or that the Commission extend the notice period an additional 120 days and require that AT&T file certain supplemental data within 60 days pursuant to Section 203(b) of the Communications Act, 47 U.S.C. § 203(b); or that the Commission suspend and investigate the tariff pursuant to Section 204 of the Communications Act. CBEMA contended in part that the proposed tariff amendments failed to satisfy the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, because AT&T had not adequately supported its cost justification for the rates in the proposed tariff. II J.A. 397.

CCIA filed its petition to reject AT&T's proposed tariff amendments on December 31, 1975, II J.A. 445.

²⁶ AT&T submitted various written materials for which it requested confidential treatment. The Commission did not rule on AT&T's request during the pendency of the proceeding. In response to a request by IBM (II J.A. 631), the Commission did direct that its rules prohibiting *ex parte* contacts with decisional personnel would be applied to the proceeding (III J.A. 895).

²⁷ *AT&T Revisions to Tariffs FCC Nos. 260 and 267*, Memorandum Opinion and Order of the Chief, Common Carrier Bureau (released March 3, 1976) ("Common Carrier Bureau Order"), at 7-8, II J.A. 650-51.

equipment which AT&T could not offer without contravening the policy established in *Computer Inquiry I* of non-regulation of data processing and the "maximum separation" rule.²⁸

The Common Carrier Bureau based its conclusion that the Dataspeed 40/4 is data processing equipment on the following findings:

(1) The Dataspeed 40/4 is in a class of equipment used and marketed solely for input, output, formatting, and conversion of computer-based data, and is not intended for or capable of basic terminal-to-terminal transmission of record or other messages; and

(2) The primary function, design and marketing of the Dataspeed 40/4 is as an integral part of a data processing service involving the programmed interaction of the terminal device and a central computer processing unit.²⁹

Since the Commission has not delegated its authority to suspend and investigate tariffs,³⁰ the Common Carrier Bureau did not rule on IBM's and CBEMA's petitions in the alternative for investigation of the Dataspeed 40/4 tariff.

On April 2, 1976, AT&T petitioned the Commission to review the Common Carrier Bureau decision (II J.A. 655).³¹ On January 5, 1977, the Commission, reversing

²⁸ *Id.* at 3-7, II J.A. 646-50.

²⁹ *Id.* at 5-6, II J.A. 648-49. The Common Carrier Bureau also ruled that AT&T satisfied Section 61.38 of the Commission's Rules in view of AT&T's submission of "additional material" at the Commission's request. *Id.* at 7, II J.A. 650.

³⁰ Section 0.291(d) of the Commission's Rules, 47 C.F.R. § 0.291(d). See *Part O—Commission Organization*, 36 R.R.2d 205, 206 (1976); 41 Fed. Reg. 54766 (December 15, 1976).

³¹ On April 2, 1976, CBEMA also filed a petition (III J.A. 690) to review the decision, limited to the question whether the Common Carrier Bureau was correct in ruling that AT&T had satisfied Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

the Common Carrier Bureau, ruled that AT&T's Dataspeed 40/4 tariff amendment should not be rejected and ordered that the amendment could be refiled and placed in effect on fourteen days' notice.³² The Commission held:

(1) That *Computer Inquiry I* was addressed solely to the "provision and utilization of central host computers by communications common carriers in the offering of their data processing services" and therefore did not in terms preclude the tariffing of remote equipment such as the Dataspeed 40/4;³³

(2) That, its *Computer Inquiry I* rules aside, the Dataspeed 40/4 is not "primarily" a data processing service although it "represents a combination of both communications and data processing";³⁴ and

(3) That in view of the "inadequacy" of [the Commission's] rules as they pertain to the Dataspeed 40/4, the Commission would enlarge a pending rulemaking proceeding³⁵ to include the issues raised by such devices and the Commission's decision not to reject the Dataspeed 40/4 tariff was made "subject to any subsequent determination made by the Commission in the new *Computer Inquiry II*."³⁶

The Commission adverted to and effectively denied the petitions of IBM and CBEMA for suspension and investigation of the Dataspeed 40/4 tariffs.³⁷

³² Dataspeed 40/4 Order, 62 F.C.C.2d at 32-33, III J.A. 983-84.

³³ *Id.*, 62 F.C.C.2d at 28-29, III J.A. 979-80.

³⁴ *Id.*, 62 F.C.C.2d at 29-30, III J.A. 980-81.

³⁵ See *Amendment of Section 64.702 of the Commission's Rules and Regulations* (Docket No. 20828), Notice of Inquiry and Proposed Rulemaking, 61 F.C.C.2d 103 (1976) ("*Computer Inquiry II*").

³⁶ Dataspeed 40/4 Order, 62 F.C.C.2d at 31, III J.A. 982.

³⁷ *Id.* 62 F.C.C.2d at 21, III J.A. 969. The Commission affirmed the Common Carrier Bureau's ruling that AT&T's submission complied with Section 61.38 of the Commission's Rules. Since we understand that the concurrently filed brief of petitioner CBEMA addresses in detail the inadequacy of the Commission's decision on this aspect of the case, we do not discuss that question in this brief.

Commission Chairman Wiley filed a Concurring Statement registering "concern that rigid application by analogy of those [*Computer Inquiry I*] rules to terminals might result in denying communications options and alternatives to consumers" in view of "the effect of the 1956 Consent Decree on AT&T's ability to offer data terminals. . . ." ³⁸ In this regard, Chairman Wiley stated that:

"[u]nder such circumstances, it is neither surprising nor inappropriate that the Commission would consider the practical consequences for consumers if they are denied access to desired equipment." ³⁹

Chairman Wiley also stressed that he would have had "considerable difficulty in concurring" with the decision not to reject the tariff were the decision not "subject to the outcome of the overall inquiry and rulemaking" in the pending *Computer Inquiry II*.⁴⁰

On March 8, 1977, the Commission, pursuant to its Dataspeed 40/4 Order, issued a Supplemental Notice of Inquiry in its *Computer Inquiry II* rulemaking pro-

³⁸ Concurring Statement of Chairman Richard E. Wiley in re the Dataspeed 40/4 Case, 62 F.C.C.2d at 33, III J.A. 985.

In 1956, AT&T entered into a Consent Decree in which it agreed in essence to restrict its service offerings to "common carrier communications services," which the Consent Decree defines as "communications services and facilities . . . the charges for which are subject to public regulation. . . ." *United States v. Western Electric Co., Inc. and AT&T*, 1956 Trade Cases ¶ 71,134 (D. N.J. 1956) ("1956 Consent Decree"). The 1956 Consent Decree could be construed to prohibit AT&T or any of its affiliates from providing the Dataspeed 40/4. See Tentative Decision, 28 F.C.C.2d at 298-99, 304; letter to Joseph A. Marino, Common Carrier Bureau, from Jonathan C. Rose, Deputy Assistant Attorney General, Antitrust Division, III J.A. 965. The significance of the 1956 Consent Decree in this proceeding is discussed at pages 32-34, *infra*.

³⁹ Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33, III J.A. 985.

⁴⁰ *Id.*, 62 F.C.C.2d at 33, III J.A. 986-87.

ceeding.⁴¹ In this Supplemental Notice, the Commission, after reviewing certain of the technological developments discussed above, stated that the "new technology may . . . have rendered meaningless any real distinction between 'terminals' and computers."⁴² The Commission proposed the following definition of "data processing":

"'Data processing' is the electronically automated processing of information wherein (a) the information content, or meaning, of the input information is in any way transformed, or (b) where the output information constitutes a programmed response to input information."⁴³

The Commission also described certain "processing activities which by their nature would constitute data processing within the meaning of this proposed definition."⁴⁴ According to the Commission, these include, *inter alia*:

"*arithmetic processing*—applications include: general commercial accounting, inventory control, banking and point-of-sale processing, financial and econometric modeling, scientific calculations, etc.;

"*word processing*—applications include: interactive information retrieval systems, management information systems, text editing, translation, typesetting, etc.;

⁴¹ *Amendment to Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry)* (Docket No. 20828), Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking, FCC 77-151 (released March 8, 1977) ("Supplemental Notice").

⁴² *Id.* at 5.

⁴³ *Id.* at 5-6 (footnotes omitted). The Supplemental Notice went on to define "programmed" as follows:

"'Programmed,' as used herein constitutes the means of pre-ordaining a response to given input or stimulus regardless of whether the means is achieved through the use of software, hardware, firmware or fundamental equipment design." *Id.* at 6 n.11.

See page 10 note 16 *supra*.

⁴⁴ Supplemental Notice at 10.

"process control—applications include the use of electronic equipment to monitor and control some process which is occurring on a continuing basis—such as nuclear-powered generating stations, an electric power distribution grid, an automatic machine tool, or a fire detection and control system."⁴⁵

The Supplemental Notice further stated that in determining whether a device was data processing or communications under its proposed definition, the Commission would focus not on the individual "functions" performed but rather on the processing "activity" as a whole, which the Commission defined as the "aggregate end result of a combination of operations, no matter where performed."⁴⁶

Proceedings in this Court

On January 4, 1977, IBM filed in this Court its petition for review of the Dataspeed 40/4 Order. Thereafter, this Court consolidated IBM's petition with petitions subsequently filed by CBEMA and CCIA seeking review of the same Commission Order.⁴⁷ AT&T and the

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 10 n.19.

⁴⁷ On January 13, 1977, CCIA filed in the District of Columbia Circuit a petition for review and motion for stay of the Dataspeed 40/4 Order. CCIA had previously filed with the Commission a Motion for Stay and Application for Stay Pending Appeal. On January 17, 1977, the District of Columbia Circuit transferred CCIA's petition and motion to this Court, pursuant to 28 U.S.C. § 2112(a), because of IBM's previously filed petition in this Court. On January 18, 1977, the Commission denied CCIA's motion for stay. Memorandum Opinion and Order (adopted January 18, 1977). The Commission *sua sponte* extended the effective date of the Dataspeed 40/4 tariff in view of CCIA's pending motion before this Court for a stay of the Commission's Order. *Id.* at 5-6. On January 25, 1977, a panel of this Court (Circuit Judges Mulligan and Meskill and District Judge Van Pelt Bryan) denied CCIA's motion for stay. III J.A. 989.

On February 3, 1977, CBEMA filed in the District of Columbia Circuit a petition for review of the Dataspeed 40/4 Order and a motion to transfer its petition to this Court pursuant to 28 U.S.C. § 2112(a). On February 18, 1977, CBEMA's petition was transferred to this Court.

United States Independent Telephone Association have been granted leave to intervene in all three cases.

SUMMARY OF ARGUMENT

I

Th Commission erred in permitting AT&T to offer the Dataspeed 40/4 as a communications device under tariff. The Commission's Order is directly inconsistent with the rules and policies previously established by the Commission in *Computer Inquiry I*, and no adequate explanation has been given for the inconsistency. Administrative agencies may reverse policy only with reasoned explanation therefor. *Columbia Broadcasting System v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971).

In determining whether the Dataspeed 40/4 was a data processing offering, the Commission erroneously focused only on functions performed by the Dataspeed 40/4 itself without regard to its dependent interactive relationship with a CPU. The test here as to whether the Dataspeed 40/4 is a data processing device should have been the general test now proposed in *Computer Inquiry II*, i.e., whether the operations of the whole system of which a device is an integral part are data processing activities. But under either test the Dataspeed 40/4 is a data processing offering not subject to Commission tariff.

In reaching its decision, the Commission erroneously gave weight to the possibility that, if it found the Dataspeed 40/4 tariff to be a data processing service, the 1956 AT&T Consent Decree might prevent AT&T from offering the device at all. The Commission must limit itself to areas confined to its jurisdiction. *GTE Service Corp. v. FCC*, *supra*. Efforts to affect administration of an antitrust consent decree are outside the agency's jurisdiction.

II

Even if the Commission's decision not to reject the Dataspeed 40/4 tariff outright is sustained, the Commission's unexplained failure to suspend the tariff and investigate its lawfulness was an abuse of discretion in view of the substantial questions raised and not fully resolved by the Commission. The stated basis of the Dataspeed 40/4 order cannot be reconciled with the Commission's proposed treatment of data processing and communications contained in the Supplemental Notice of Inquiry in *Computer Inquiry II*. This inconsistency confirms the arbitrariness of the Commission's failure to conduct a full investigation.

ARGUMENT

Introduction

In Point I we demonstrate that (1) the *Computer Inquiry I* rules and policies are applicable to the Dataspeed 40/4; and (2) those rules and policies require that the device be provided only on an unregulated basis under the Commission's "maximum separation" rule. We also demonstrate that the Dataspeed 40/4 functions primarily as a data processing device, not as a communications terminal. In these circumstances, we show that the Commission should have exercised its power to reject the Dataspeed 40/4 tariff as unlawful.⁴⁸

In Point II, we show that even if outright rejection of the tariff is not required as a matter of law, there should be a remand for suspension and investigation of the tariff. Such a course is required particularly in

⁴⁸ As this Court has recognized, the Commission has the power to reject a tariff. *American Telephone and Telegraph Co. v. FCC*, 487 F.2d 865, 880 n.33 (2d Cir. 1973); *Municipal Light Boards v. FCC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Associated Press v. FCC*, 448 F.2d 1095 (D.C. Cir. 1971). See *Southern Pacific Communications Co.*, FCC 77-103 (Feb. 16, 1977), slip op. at 16; *Press Wireless, Inc.*, 21 F.C.C. 311 (1956), *aff'd per curiam*, 264 F.2d 372 (D.C. Cir. 1959).

view of the Commission's confession as to its own uncertainties, its inclusion in *Computer Inquiry II* of issues it was purporting to decide here, and the irreconcilability of the Commission's analysis in the instant case with its analysis in the Supplemental Notice in *Computer Inquiry II*. At a minimum, on such a remand the investigation of the Dataspeed 40/4 tariff could be consolidated with *Computer Inquiry II*.

We recognize that an administrative agency is entitled to deference in applying its expertise, and especially in interpreting its own rules and policies. But here the Commission has reversed its own expert Common Carrier Bureau in a singularly unsatisfying opinion. As Judge Leventhal noted in terms remarkably applicable to this case, a reviewing court's

"alertness . . . [is] prompted . . . by the circumstance first that the agency rejected the result reached by its Hearing Examiner, and, further, that it was manifestly in a state of flux and evolution of its approach to the kind of issue presented by this proceeding." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 406 U.S. 950 (1972).

In the past, this Court has not hesitated to reverse a decision of the Commission found to be arbitrary. *See, e.g., National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 541-44 (2d Cir. 1975). The Court should not hesitate to do so here.

I. THE COMMISSION ERRED IN FAILING TO REJECT AS UNLAWFUL AT&T'S DATASPEED 40/4 TARIFF AMENDMENTS ON THE BASIS OF THE SUBMISSIONS BEFORE IT.

A. The Commission's Decision To Tariff the Dataspeed 40/4 Erroneously Fails to Apply the Rules and Policies of Computer Inquiry I.

In *Computer Inquiry I*, the Commission based its policy of non-regulation of the data processing industry

on its fully supported determination that regulation of that intensely competitive industry was unnecessary. The Commission recognized that this reasoning applied fully to the data processing industry's provision of remote data processing services:

"... we see no need to assert regulatory authority over data processing services *whether or not such services employ communications facilities in order to link the terminals of the subscribers to centralized computers*. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment."⁴⁹

It found that reasoning equally applicable to the provision of remote data processing services that involve incidental communications elements:

"... we believe that the imposition of regulatory constraints over what is clearly a data processing hybrid offering, even though it contains communications elements which are an integral part of and an incidental feature thereof, would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest. *In essence, we recognize no overriding public interest requirement at this time to regulate a service which, due to its nature, except for incidental and peripheral communications elements, is appropriately offered in the existing competitive environment.*"⁵⁰

The remote data processing field discussed in *Computer Inquiry I* now includes the Dataspeed 40/4, IBM 3270, and many other competing devices. This industry is

⁴⁹ Tentative Decision, 28 F.C.C.2d at 298 (emphasis added). As discussed more fully below, the quoted language demonstrates that the Commission considered remote data or distributed data processing in *Computer Inquiry I* (see page 28, *infra*), and that the Commission considered the remote terminal to be separate from the communications facilities involved (see note 60 *infra*).

⁵⁰ Final Decision, 28 F.C.C.2d at 278 (emphasis added).

highly competitive and technologically innovative. The Commission made no contrary finding in its Dataspeed 40/4 Order. It did not find—nor could it find—that there are any natural or economic barriers to entry or monopoly conditions that would justify regulation of that industry. The Commission did not make any economic or other findings that would support the conclusion that regulated common carriers such as AT&T should be permitted to offer equipment in that marketplace on a regulated basis.⁵¹ In short, the Commission made no findings in the Dataspeed 40/4 Order that even purported to compel or suggest a basis for deviating from the policy of non-regulation it established in *Computer Inquiry I*.

Computer Inquiry I's "maximum separation" rule was based on the Commission's justified conclusion that adequate safeguards were needed to prevent communications common carriers from making their common carrier users bear the costs of their data processing ventures.⁵² The Commission recognized that these risks inhere in the provision by regulated common carriers of remote data processing equipment. As the Commission stated, the need for the "maximum separation" rule

"exists whether or not at the present time the carrier is engaged in the sale of *local or remote data processing*. In either instance, there is a potential for abuse in the form of a commingling of costs associated with the rendition of communication and data processing services, which can give rise to the above-discussed problems of cross-subsidization and other unfair competitive practices in the pricing of regulated and non-regulated services."⁵³

⁵¹ Indeed, there can be no such justification except in those areas which have "natural monopoly" characteristics. The Dataspeed 40/4 competes directly with equipment offered by numerous unregulated enterprises and thus need not and should not be regulated.

⁵² See pages 5-6 *supra*.

⁵³ Tentative Decision, 28 F.C.C.2d at 302 (emphasis added).

The Dataspeed 40/4 Order makes no finding that these serious risks are absent in AT&T's provision of the Dataspeed 40/4 on a regulated basis. The Dataspeed 40/4 Order is utterly devoid of any attempt to rationalize its results in terms of the "maximum separation" rule.

Thus, the very factors that led the Commission to adopt its policy of non-regulation and the "maximum separation" rule in *Computer Inquiry I*—intense competition in the data processing industry and risks of comingling—are present in the Dataspeed 40/4 case. The Dataspeed 40/4 Order fails to explain why in these circumstances the Dataspeed 40/4 should be tariffed or how such tariffing is reconcilable with the policy rationale of *Computer Inquiry I*.⁵⁴ The Commission's utter failure to confront these fundamental issues exposes the arbitrariness of the Dataspeed 40/4 Order.

The Dataspeed 40/4 Order does point to one supposed distinction between *Computer Inquiry I* and the Dataspeed 40/4 case: the Commission's view—which we believe to be erroneous—that *Computer Inquiry I* was addressed solely to the provision of data processing services by a regulated common carrier's CPU.⁵⁵ The Com-

⁵⁴ Cf. *Western Union Telegraph Co.*, 59 F.C.C.2d 140 (1976), where the Commission decided that a service combining data processing and communications elements should not be tariffed because the argument offered by the proponent of the tariff did "not alter the considerations which underlie the rules and policies prescribed in the *Computer Inquiry I* . . ." and because the case presented "a perfect illustration of the concerns [cross-subsidization] which prompted our *Computer Inquiry I*." *Id.* at 145.

⁵⁵ The Commission stated:

" . . . [A] crucial and distinguishing factor which limits the applicability of Section 64.702 and the maximum separation policy to the Dataspeed 40/4 offering is the fact that AT&T is not providing and does not propose to offer the data processing operations of the central computer which render the Dataspeed 40/4 functional. The maximum separation policy was directed to the provision and utilization of central host computers by communications common carriers in the offering of their data processing services. If AT&T, as a com-

mission stated that since AT&T does not offer the services of a CPU along with the Dataspeed 40/4, AT&T can offer the Dataspeed 40/4 under tariff.

This supposed distinction is evanescent. The record nor the decision in *Computer Inquiry I* reveals any express or implied limitation of its policies and rules to services performed by a regulated common carrier's CPU. The Dataspeed 40/4 Order does not even purport to cite any such statement in *Computer Inquiry I*, and it could not. The record in *Computer Inquiry I* manifests that the Commission was cognizant of and addressed questions raised by remote data processing.

The Commission's Notice of Inquiry in *Computer Inquiry I* expressly identified remote data processing as one subject to be considered. For example, at one point it stated:

"The interdependence between data processing and communication channels is bound to continue under the impetus of *remote processing* in combination with the growth of time-shared computer systems and services."⁵⁶

One respondent urged that that Notice, which requested a description of uses that were currently being made and were anticipated to be made of computer and communications facilities, be expressly amended to include remote computer equipment.⁵⁷ The Commission subsequently ruled that the initial Notice should properly be

mon carrier, offered as a part of the Dataspeed 40/4 service the data processing capabilities of the central computer, the maximum separation policy would apply." Dataspeed 40/4 Order, 62 F.C.C.2d 28, III J.A. 979.

⁵⁶ Notice of Inquiry, 7 F.C.C.2d at 16 (emphasis added). In time-shared computer systems, numerous remote processing devices at various locations interact with a single CPU with such speed that each terminal has virtually instant access to the CPU.

⁵⁷ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Supplemental Notice of Inquiry, 7 F.C.C.2d 19, 20 (1967).

construed to embrace questions relating to such equipment.⁵⁸ Moreover, *Computer Inquiry I* discussed both the non-regulation of data processing policy and the "maximum separation" rule in the context of remote access data processing as well as CPU data processing.⁵⁹

The Commission promulgated rules that expressly address remote data processing devices and subject such devices to the "maximum separation" rule. *Computer Inquiry I* defined a "remote access data processing service" as:

"an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals." Rule 64.702(a)(4), 47 C.F.R. § 64.702(a)(4).

The "remote customer terminal" is expressly distinguished as something separate and apart from "communications facilities." The definition identifies the "communications facilities" as "*linking* a central computer to remote customer terminals" (emphasis added). Under this definition, the "remote customer terminal" cannot be considered a part of the carrier's "communications facilities" as the Dataspeed 40/4 Order apparently contends.⁶⁰

⁵⁸ *Id.* at 20-21. Numerous respondents submitted comments relating to remote access data processing applications. For example, the General Services Administration's comments explained: "The Departments of Defense, Commerce, and the Veterans Administration and National Aeronautics and Space Administration and the U.S. Geological Survey are now using processors with remote input/output terminals and/or satellite computers." *Computer Inquiry I*, Statement on Behalf of the Customer Interest of the Executive Agencies of the United States (March 5, 1968), at 12.

⁵⁹ See pages 6-7 *supra*.

⁶⁰ Dataspeed 40/4 Order, 62 F.C.C.2d 28-30, III J.A. 979-81.

In *Computer Inquiry I*, the Commission often reiterated this express distinction between remote data processing devices and "communications facilities." For example, the Commission referred

It is indisputable that the Dataspeed 40/4 falls within Section 64.702(a) (4) insofar as it is a "remote customer terminal" linked to a CPU by communications facilities that provide a vehicle for the transmission of data between it and the CPU. The only question remaining under the rule is whether the terms "an offering of data processing" require the offering of a CPU as well as the remote device. We have previously demonstrated that any such requirement is wholly inconsistent with the policy rationale of *Computer Inquiry I*. Far from a natural monopoly, the marketplace that the Dataspeed 40/4 would enter is highly competitive. This is reason enough to reject as untenable the Commission's wooden construction of Section 64.702(a) (4). But if it were not, two additional reasons compel that conclusion.

First, the language of Section 64.702(a) (4) does not in terms exclude a situation where a regulated carrier provides the remote device and an unregulated company provides the CPU. Moreover, at no point in *Computer Inquiry I*'s discussions concerning remote data processing devices is there the slightest hint that the Commission was reserving decision on cases where the remote device is offered by a common carrier, but the CPU is not—let alone a suggestion that the Commission would have reached a contrary result in such a case.

Second, the term "data processing" as used in Section 64.702(a) (4), must reasonably be construed to apply to the Dataspeed 40/4. Section 64.702(a) (1) defines "data processing" as:

to the use of "communications facilities to link the terminals . . . to centralized computers." Tentative Decision, 28 F.C.C.2d at 298. As another point, the Commission said that regulated communications common "carriers engaging in remote access data processing will be providing the communications component of the service to themselves, as well as to their computer service competitors . . ." *Id.* at 299. In that sentence, the term "communications component" cannot sensibly refer to the remote data processing device.

"the use of a computer for the processing of information as distinguished from circuit or message-switching. 'Processing' involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging, and calculating data, according to programmed instructions."

The Dataspeed 40/4 is a necessary, albeit geographically dispersed, part of a data processing system that involves the "use of a computer for the processing of information." The Dataspeed 40/4 can perform no useful function unless it is linked to a CPU in a data processing system. It is absurd to suggest that the Dataspeed 40/4's symbiotic relationship with the CPU should be ignored in determining whether it comes within the Commission's definitions of "data processing" and "remote access data processing."

The Commission wrongly ignored these considerations in ruling that the *Computer Inquiry I* rules do not apply to the Dataspeed 40/4. The Commission then proceeded to consider whether the Dataspeed 40/4 should be tariffed, "apart from" those rules, and concluded that it should.⁶¹ That conclusion was equally in error. Even if *Computer Inquiry I* had been limited in terms to CPU data processing and did not address the precise equipment at issue in this case, the Commission's Dataspeed 40/4 Order offers no explanation of why this required it to reach a result inconsistent with the policy rationale of *Computer Inquiry I*. The Commission did not conclude that where a regulated common carrier or any other concern offers a remote device, but not the CPU, economic or policy considerations relating to the communications industry—the only industry the Commission has jurisdiction to regulate, *GTE Service Corp.*, *supra*—justify the imposition of a regulatory tariff. Nor did the Commission find that the dangers which led it to adopt the

⁶¹ Dataspeed 40/4 Order, 62 F.C.C.2d at 28-32, III J.A. 979-84.

"maximum separation" rule are any less present where a regulated common carrier offers data processing services by providing a remote device and the communications line than where the carrier also provides the CPU.

Thus, the Dataspeed 40/4 Order represents a significant unexplained deviation from the policies previously announced in *Computer Inquiry I* and reaches a result inconsistent with that precedent. The Commission is, of course, free to make reasonable changes in its policies, but there is:

"... the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System v. FCC*, 454 F.2d at 1026.⁶²

The Commission has failed to fulfill its administrative obligation to identify and articulate fully its reasons for its apparent abandonment of the standards and policies it enunciated in *Computer Inquiry I*. The Commission's bald assertion of the supposed distinction between *Computer Inquiry I* and the Dataspeed 40/4 case falls far short of its obligation to provide reasoned administrative decisionmaking. See 2 K. Davis, *Administrative Law Treatise* § 16.11 (1958). For, as the courts have often stressed:

"[T]he Commission 'must explain its reasons and do more than enumerate factual differences, if any, between * * * [similar] cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act.'" *Columbia Broad-*

⁶² See *Secretary of Agriculture v. United States*, 347 U.S. 645, 653-54 (1954); *Greyhound Corp. v. ICC*, No. 75-2062 (D.C. Cir. Jan. 21, 1977); *Greater Boston Television Corp. v. FCC*, 444 F.2d at 851-52.

casting System v. FCC, 454 F.2d at 1026, quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).⁶³

The Commission's unexplained assertion of regulatory power over the remote data processing field raises questions as to whether the Commission has transgressed the jurisdictional boundaries delineated by this Court in *GTE Service Corp.*, *supra*. It is difficult to reconcile the Dataspeed 40/4 Order with this Court's holding that the Commission has no authority over data processing services except where the provision of those services by a regulated common carrier harms, or threatens to harm, the provision of that carrier's regulated communications services. 474 F.2d at 732-36. The Dataspeed 40/4 Order is devoid of any attempt to establish that the Dataspeed 40/4 must be tarified to avoid harm, or the threat thereof, to AT&T's regulated common carrier communications activities. Indeed, the Order provides no articulated basis whatsoever for concluding that the Commission's assertion of regulatory power was based on concerns related to communications.

To the contrary, there is every indication that underlying the rationale for the Commission's Dataspeed 40/4 Order were considerations relating to the data processing industry—a regulatory rationale expressly prohibited by this Court in *GTE Service Corp.*, 474 F.2d at 732-36. The Concurring Statement of Commission Chairman Wiley explains that the Dataspeed 40/4 Order was based at least in part on the Commission's apprehension that a ruling that AT&T could not tariff the Dataspeed 40/4 would, because of the 1956 Consent Decree, eliminate a major competitor from the remote data processing de-

⁶³ See *Greyhound v. ICC*, *supra*, slip op. at 4 n.1 ("... if the Commission does choose to rely on the fact of Greyhound's predominance, it must state clearly the relevance of this fact to its decision").

vice field.⁶⁴ Chairman Wiley stated that his "initial and tentative" inclination that the Dataspeed 40/4 should be viewed as "stand alone" data processing equipment was overborne by a number of factors, the most significant of which was the "effect of the 1956 Consent Decree on AT&T's ability to offer data terminals"

The maintenance of competition in the remote data processing field is a matter of antitrust policy rather than an issue of common carrier communications policy to be resolved by the Commission. In this connection IBM believes that if the 1956 Consent Decree is construed to prevent AT&T from offering the Dataspeed 40/4, the Decree should be modified to permit AT&T to do so on an unregulated basis.⁶⁵ Consent decree considerations cannot justify departure by the Commission from its rules and policies to assert jurisdiction it does not have over data processing.

IBM does not question *whether* AT&T should be permitted to continue to compete; IBM questions only *how* AT&T should be permitted to compete. What IBM objects to, and what is fundamentally incorrect about the Dataspeed 40/4 Order, is that it permits AT&T to compete from the haven of regulation. When AT&T and other regulated carriers offer equipment which competes with, is structurally similar to, functionally interchangeable with, and used for the same purposes as data processing equipment which is offered by unregulated manu-

⁶⁴ Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33, III J.A. 985. The majority opinion does not in any way negate this statement by the Chairman.

The Commission twice sought the opinion of the Justice Department concerning the impact of the 1956 Consent Decree (Letter of May 20, 1976 from Mr. Hinchman to Mr. Kauper, III J.A. 961; Letter of August 6, 1976, from Mr. Marino to Mr. Rose, III J.A. 963) and received a response from the Justice Department prior to rendering its Dataspeed 40/4 Order (Letter of September 2, 1976, from Mr. Rose to Mr. Marino, III J.A. 965).

⁶⁵ See IBM's Response to Support of Application for Review, filed May 13, 1976, at 1-4.

facturers, the policy of the "maximum separation" rule applies.

The Commission's answer in its Dataspeed 40/4 Order to the dilemma it apparently perceived in the 1956 Consent Decree is a back door effort to avoid that Decree and stands sound antitrust and regulatory policy on its head. In the name of preserving competition in these remote data processing devices, the Commission has authorized AT&T to offer the Dataspeed 40/4 in a manner the Commission has itself emphatically recognized might very well occasion adverse effects on AT&T's provision of common carrier communications services to the public. Moreover, the Dataspeed 40/4 decision embroils the Commission in haphazard piecemeal regulation of the data processing industry which the Commission itself has recognized is ill-suited for any regulation at all.

B. The Commission Erred in Holding That the Dataspeed 40/4 Is Not a Data Processing Device.

The Commission appears to have recognized that, regardless of the applicability of *Computer I Inquiry* rules and policies, the Dataspeed 40/4 should not be tariffed if it is in fact a data processing device. We submit that the Commission's finding that the Dataspeed 40/4 is merely a communications device cannot be sustained.

The Dataspeed 40/4 is designed to serve a single purpose—interaction with the CPU of a data processing system. The Dataspeed 40/4 does not have the capability of functioning directly with any equipment other than a CPU. It cannot even initiate a transmission without a command from the CPU. As the Commission recognized:

"The Dataspeed 40/4, is one of a new class of 'smart' remote devices designed specifically to interface with a host computer data processing system. If it were required to communicate with another

Dataspeed 40/4, *it could do so only through a host computer and under computer control.*"⁶⁶

AT&T statements confirm the single-purpose nature of the Dataspeed 40/4. For example, an AT&T affiliate has stated that the Dataspeed 40/4 was designed "for applications requiring efficient data preparation and retrieval . . ." rather than "in message oriented systems which in the past would have utilized teletypewriter equipment."⁶⁷ AT&T has also stated that the Dataspeed 40/4's

*"efficient interactive mode of operation will make it extremely attractive for computer input-output applications such as inquiry-response, data entry and data retrieval."*⁶⁸

The Common Carrier Bureau pointed to the fact, not disputed by the Commission, that the Dataspeed 40/4 "was developed to be marketed for use in conjunction with an IBM 360 computer or other large computer system."⁶⁹

The Commission recognized that the Dataspeed 40/4 closely resembles in structure, function, and operation other remote data processing devices such as the IBM 3270, which were designed to interact solely with a CPU, and as such, to become integral elements of data processing systems.⁷⁰ The Common Carrier Bureau found that the Dataspeed 40/4 is in a class of

⁶⁶ Dataspeed 40/4 Order, 62 F.C.C.2d at 23, III J.A. 971 (footnote omitted; emphasis added); see Common Carrier Bureau Order, at 6, II J.A. 649. AT&T, Synchronous "Dataspeed" 40 System Description BSP 582-200-001, Oct. 30, 1975, at 3, I J.A. 168.

⁶⁷ "Description of Service" page in the backup material furnished to the New York Public Service Commission by the New York Telephone Company, as part of its October 15, 1975, state tariff filing for the Dataspeed 40/4, Tariff P.S.C. No. 800, II J.A. 442.

⁶⁸ Teletype Synchronous Model 40/4 Data Terminals Catalog (ed. No. 1975), at 2, I J.A. 209 (emphasis added).

⁶⁹ Common Carrier Bureau Order, at 6, II J.A. 649.

⁷⁰ Dataspeed 40/4 Order, 62 F.C.C.2d at 22-23, III J.A. 971.

"equipment, designed from their inception to be used and marketed solely for the input, output, formatting and conversion of computer-based data. These devices are not generally intended for, nor indeed capable of, basic terminal-to-terminal transmission of... messages. They are intended instead for either on-site or remote access interaction with a central computer storage and/or processing unit. Some examples of this class of equipment are the IBM 3270, IBM 3735, Incoterm SPD 10/20, COMPUTEK Series 2000."⁷¹

Indeed, as the Commission found, it appears that AT&T designed the Dataspeed 40/4 for the express purpose of competing with these other remote data processing devices.⁷²

AT&T has described its perception of the "market" for the Dataspeed 40/4 as the "CRT (cathode ray tube) and data terminal equipment market."⁷³ AT&T has claimed that the Dataspeed 40/4 is:

"compatible with existing computer support systems developed for keyboard display and printer devices. This type of cathode ray tube (CRT) accounts for approximately 54% of the total CRT market, according to an AT&T Market Study. It is particularly prevalent in the brokerage, financial, airlines and utilities industries."⁷⁴

Significantly, AT&T has acknowledged that it examined "the portion of the CRT's in the market which operate

⁷¹ Common Carrier Bureau Order, at 5, II J.A. 648.

⁷² Dataspeed 40/4 Order, 62 F.C.C.2d at 23, III J.A. 971.

⁷³ Attachment C to AT&T Transmittal No. 12449. "Description of Basis of Market and Revenue Estimates," at 1, I J.A. 258.

⁷⁴ "Description of Service" page in the backup material furnished to the New York Public Service Commission by the New York Telephone Company, as part of its October 15, 1975, state tariff filing for the Dataspeed 40/4, Tariff P.S.C. No. 800, II J.A. 442.

similar to the items being filed herein" to estimate the size of the potential "market."⁷⁵ One question on a customer survey utilized by AT&T asked "[i]f the Bell System offered a cluster controller on terminals *similar to the IBM 3270 CC [cluster controller] and terminals,*" would the respondent lease the Bell product if the lease rate was the same, more, or less than the IBM 3270.⁷⁶ An internal AT&T memorandum reveals that AT&T relied on a customer survey that "indicated . . . [the customers'] interest in a Bell provided cluster that functioned *similarly to an IBM 3270,*" and that AT&T "[t]herefore . . . used this as the basis for [its price] analysis."⁷⁷ AT&T did in fact establish prices for the Dataspeed 40/4 at least in part by reference to IBM's charges for the 3270.⁷⁸

These very similar devices which AT&T designed the Dataspeed 40/4 to compete with are without question considered data processing equipment.⁷⁹ The Dataspeed 40/4 Order did not purport to claim that these similar devices offered by non-regulated companies are communications devices or are conceivably tariffable.⁸⁰ The Data-

⁷⁵ *Id.*

⁷⁶ AT&T Cluster Controller Survey, Tables 84 and 85, I J.A. 4.

⁷⁷ AT&T Market Forecasts for Synchronous DATASPEED 40 (10/15/75), at 4, I J.A. 165 (emphasis added).

⁷⁸ Thus, an AT&T study explains that "[t]he rates selected produced a total cluster revenue . . . which when compared to IBM's rate . . . produces a ratio of 90.04% against a target of 90%." *Id.* at 15.

⁷⁹ The finding of the Common Carrier Bureau (Order, at 6, II J.A. 649) that none of the terminals with which the Dataspeed 40/4 is interchangeable "have been alleged to be communications devices" is undisputed.

⁸⁰ In a pleading filed with the Commission, AT&T made an oblique suggestion, wholly at odds with the policy set forth in *Computer Inquiry I*, that the Commission embark on regulation of the data processing industry. (Opposition of AT&T filed January 9, 1976, at 16, II J.A. 470.) We know of no reason for bur-

speed 40/4 Order fails to explain how the mere fact that AT&T, a common carrier, rather than an unregulated company, furnishes such equipment transmutes that equipment into a communications device.

As the Commission's Supplemental Notice in *Computer Inquiry II* seems to confirm, the single-purpose characteristic of the Dataspeed 40/4 renders wholly irrelevant any comparison—such as AT&T asserted before the Commission⁸¹—between the Dataspeed 40/4 and a conventional teletypewriter.⁸² Originally, teletypewriters were used to transmit record messages from one teletypewriter to another—a traditional communications service designed to transport information from place to place and nothing else.⁸³ As technology developed, it became possible to use the same teletypewriter for dual purposes: transmission between teletypewriter terminals; and input to and output from a CPU. Notwithstanding the additional computer-related use to which teletypewriters are now put, they—unlike the Dataspeed 40/4—can be and are also used to perform traditional terminal-to-terminal communication services. It cannot be said of the teletypewriter, as it can about the Dataspeed 40/4, that its sole use is as an integral element of a data processing system.

Thus the Common Carrier Bureau was correct in finding that:

“[T]he Dataspeed 40/4 terminal clearly falls within . . . [a] class of equipment . . . whose primary func-

dening this competitive marketplace with tariff regulation, even if it were within the Commission's jurisdiction to do so, and AT&T has advanced none.

⁸¹ See Dataspeed 40/4 Order, 62 F.C.C.2d at 25, III J.A. 974; Common Carrier Bureau Order, at 3, II J.A. 646.

⁸² Supplemental Notice, pp. 5-f, 10-11. See pages 19-20 *supra*.

⁸³ The teletypewriter tariffs date from this use. Whether teletypewriters should be tariffed when used in data processing systems is not at issue in this proceeding.

tion, design, and marketing is as an integral part of a data processing service involving the programmed interaction of the terminal device and a central computer processing and/or storage unit";⁸⁴

and that the Dataspeed 40/4 "was intended from its inception to be inextricably intertwined with data processing."⁸⁵ AT&T did not challenge these findings before the Commission; and the Commission did not overturn them. On the contrary, the Commission agreed that the "interconnection with a computer is essential to the functioning of the Dataspeed 40/4 and that the computer to which it is connected does data processing."⁸⁶ Since the Dataspeed 40/4 functions solely in interactive symbiosis with a CPU in a data processing system, it is necessary to analyze the operations performed by the system as a whole in determining whether the Dataspeed 40/4 is data processing equipment. The Supplemental Notice in *Computer Inquiry II* clearly indicates that the Commission now believes that this is the correct approach.⁸⁷

The primary operations performed by the Dataspeed 40/4 in interaction with a CPU are plainly data processing.⁸⁸ AT&T itself has claimed that the Dataspeed 40/4 performs "computer input-output applications such as inquiry-response, data entry and data retrieval."⁸⁹ These are classic "word processing" and "arithmetic processing" operations which the Commission's Supplemental Notice in *Computer Inquiry II* confirms are "by their nature . . . data processing" ⁹⁰ Indeed, "arithmetic

⁸⁴ Common Carrier Bureau Order, at 5-6, II J.A. 648-49.

⁸⁵ *Id.* at 6, II J.A. 649.

⁸⁶ Dataspeed 40/4 Order, 62 F.C.C.2d at 29, III J.A. 979.

⁸⁷ Supplemental Notice, at 10-11. See pages 19-20 *supra*.

⁸⁸ See pages 12-14 *supra*.

⁸⁹ See page 12 note 19 *supra*.

⁹⁰ Supplemental Notice, at 6, 10-11.

processing" is defined to include "point-of-sale processing," one of the operations Dataspeed 40/4 has been designed to perform.⁹¹

The Dataspeed 40/4 Order acknowledged that the Dataspeed 40/4 performs

"certain data processing functions which serve to streamline or otherwise improve the operator's ability to input, edit, and display information which is to be or has been processed by the central computer."⁹²

In addition, the Commission found that

"[t]he functions . . . most analogous to traditional data processing functions are the storage and buffering capabilities. . . . This storage function makes possible the 'off-line' preparation of the message"⁹³

Chairman Wiley in his Concurring Statement also acknowledged the predominant data processing functions of the Dataspeed 40/4:

"My initial and tentative inclination was to view the Dataspeed 40/4's storage, retrieval, merging, sorting, and calculating capabilities as tantamount to stand alone data processing capabilities which would require a conclusion that it is a data processing unit."⁹⁴

These data processing functions were once performed only by the CPU itself, but as a result of the technological developments discussed above, they now can be distributed to remote devices. When precisely these same functions

⁹¹ *Id.* at 6; see page 19 *supra*.

⁹² Dataspeed 40/4 Order, 62 F.C.C.2d at 30, III J.A. 980.

⁹³ *Id.*

⁹⁴ Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33, III J.A. 985 (emphasis added). Chairman Wiley went on to say that this initial judgment was tempered by his concerns relating to the 1956 Consent Decree. See pages 18-19 *supra*.

are performed by a device that is physically in the same "machine" as the CPU, or is in the same room as the CPU and is connected to it by ordinary cables, no one would question that the device is data processing equipment performing data processing services; and no one would suggest that such a device could conceivably be deemed a communications facility.

In fact, the Dataspeed 40/4 can be used locally at the site of the CPU. The basic data processing functions performed by input/output devices, without which the data processing system cannot operate, are the same whether located in the same machine, the same room, or 1000 miles away. The ability of a device to perform these same functions at a remote location does not transmute it into a communications device, as the Commission now seems to recognize.⁹⁵ The fact that communications lines are used in remote access data processing systems does not convert any of the remote access data processing functions to a communications function. To the extent that such a system includes a communications function, that function is wholly incidental to the input, output, and storage performed by the Dataspeed 40/4 and to the data processing performed by the system as a whole.⁹⁶

⁹⁵ Supplemental Notice, at 5-6, 10-11. See pages 19-20 *supra*.

Moreover, all handling of information may be said to involve "pure communications" at some particular point in the process. In assessing the nature of a service, one must do more than determine if "pure communication" has occurred at any step in the system. For if this were the test, every data processing or information handling device would seemingly have to be deemed a "communications" device. Rather, as the Commission now proposes, one must look at the functions the system performs as a whole. Supplemental Notice, at 5-6, 10-11.

⁹⁶ Only a very small part of the Dataspeed 40/4 device is used for transmission of data over common carrier wires. AT&T contemplates that a single Dataspeed 40/4 installation may have as many as 43 boxes, of which only one, the installation cluster controller, is designed to be attached to common carrier transmission lines. See Synchronous "Dataspeed" 40 System Description, Bell System Practices, Section 582-200-001, Preliminary Copy, 10/30/75, at 39, I J.A. 204.

In sum, the Commission clearly erred in reversing the ruling of its Common Carrier Bureau that the Dataspeed 40/4 tariff should be rejected.

II. THE COMMISSION'S FAILURE TO GRANT IBM'S PETITION TO INVESTIGATE THE DATASPEED 40/4 TARIFF AMENDMENT WAS ARBITRARY AND AN ABUSE OF DISCRETION.

IBM's October 5, 1975, petition to the Commission requested in the alternative that the Commission suspend and investigate the Dataspeed 40/4 tariff pursuant to Section 204 of the Communications Act to explore the serious questions as to its lawfulness which had been raised. Because the Commission has not delegated its authority to act on such petitions,⁹⁷ the Common Carrier Bureau could not, and did not, dispose of this alternative request for relief. Thus, IBM's request for suspension and investigation—as well as that of CBEMA—was still pending when the Commission considered AT&T's petition to review the Common Carrier Bureau's Order.

The Dataspeed 40/4 Order recited that IBM, CBEMA, and CCIA

“filed petitions to reject and *suspend* or for any other appropriate relief which opposed allowing the Dataspeed 40/4 tariff to become effective.”⁹⁸

Indeed, the Commission explicitly noted the distinction between the investigation remedy, which the Commission

⁹⁷ Section 0.291(d) of the Commission's Rules, 47 C.F.R. § 0.291 (d); see 41 Fed. Reg. 54766 (December 15, 1976).

⁹⁸ Dataspeed 40/4 Order, 62 F.C.C.2d at 21, III J.A. 969 (emphasis added). Moreover, the Common Carrier Bureau Order which the Commission was reviewing plainly recited that “[p]etitioners have specifically requested rejection of the tariff revisions, or in the alternative, suspension, investigation, and imposition of a requirement to defer the effective date” Common Carrier Bureau Order, at 2, II J.A. 645.

ruled that only it could grant, and the rejection remedy, which the Commission recognized could be granted by the Common Carrier Bureau.⁹⁹ Nevertheless, the Commission, without any discussion or articulated ruling whatsoever, effectively denied IBM's petition to investigate by ordering that the Dataspeed 40/4 tariff could go into effect on fourteen days notice.

In an uninterrupted line of precedent, the Commission has consistently conducted investigations pursuant to Section 204 of the Communications Act where, as here, non-frivolous questions have been raised respecting the lawfulness of a proposed tariff. For example, in a recent case the Commission suspended a proposed tariff revision for five months and set the matter for a hearing to investigate its lawfulness where

"substantial questions have been raised by the petitioners regarding [its] possible adverse impact . . ."
American Telephone & Telegraph Company, Docket No. 21122 slip op. at 12 (released Feb. 23, 1977).

In another recent case, the Commission ordered a hearing where a proposed tariff presented "novel public interest issues" *Southern Pacific Communications Co.*, *supra*, slip op. at 14.¹⁰⁰ The Commission has often followed the practice of suspending a proposed tariff where, as in this case, "[t]he questions of lawfulness raised by this tariff filing are generally the same as those under consideration in [another pending] Docket" *E.g.*, *United Video*, 49 F.C.C.2d at 881. Under the standards developed in these and similar cases, the Commission's failure to order an investigation of the Data-

⁹⁹ Dataspeed 40/4 Order, 62 F.C.C.2d at 28 n.19, III J.A. 978.

¹⁰⁰ See also *American Telephone and Telegraph Co. v. FCC*, 487 F.2d at 868, 869, citing previous Commission rulings in that proceeding ordering suspension and investigation of questionable tariffs at 12 F.C.C.2d 1028 (1968) and 19 F.C.C.2d 1083 (1969); *United Video*, 49 F.C.C.2d 878, 881 (1974).

speed 40/4 tariff was arbitrary and a reversible abuse of discretion.¹⁰¹

It is beyond dispute that substantial questions have been presented respecting the lawfulness of the Dataspeed 40/4 tariff. The Common Carrier Bureau, which has direct responsibility for the interpretation and administration of the rules governing common carrier tariffs, concluded flatly that the Dataspeed 40/4 tariff warranted outright rejection as "patently violative of the FCC's rules and policies" and "unlawful on its

¹⁰¹ This Court may review the Commission's refusal to order an investigation concerning the Dataspeed 40/4 tariff, in order to determine whether that refusal was arbitrary and an abuse of discretion in view of the substantial questions raised as to its lawfulness. See *Aberdeen and Rockfish R.R. v. SCRAP*, 422 U.S. 289, 317-19 (1975). As the Supreme Court has held, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). It is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Id.* at 141. It is commonly accepted that use of a permissive term such as Section 204's use of the term "may . . . suspend" is not sufficient to overcome the powerful presumption in favor of judicial review of agency action. *Barlow v. Collins*, 397 U.S. 159, 165-66 (1970); *Environmental Defense Fund Inc. v. Hardin*, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970) (reviewing an agency's refusal to suspend the registration of a pesticide); see L. Jaffe, *Judicial Control of Administrative Action* 346 (1965).

Municipal Light Boards v. FPC, 450 F.2d at 1349-52, is not to the contrary. The Court held only that it would not review an agency decision as to the length of a tariff suspension the agency granted. The remainder of the Court's discussion is mere *dicta*. Moreover, the Court expressly reserved decision whether judicial review is appropriate in a case, like this one, of "an agency's failure, evident on the face of the papers, to enter even a one-day suspension order that maintains the agency's ability to require substantiation of the rate" *Id.* at 1352. In any case, it would be anathema to the entire development of the law of judicial review of administrative action and inconceivable as a matter of public policy to suppose that an agency's unexplained failure to order a hearing before approving a tariff is immune from judicial review where the agency itself concedes that the lawfulness of the tariff is seriously suspect. No case so holds.

face.”¹⁰² The Commission itself expressed considerable concern that its decision on the issue of rejection was very close and subject to additional scrutiny in light of further investigation in another proceeding. The Commission frankly admitted that:

“The nature of the technology being what it is, however, we are not so presumptuous as to view our analysis of this offering as an all-encompassing one which can readily be applied to future offerings. The fact of the matter is that data processing technology has advanced since our *Final Decision* in 1971 resulting in various data processing functions of the host computer being distributed among peripheral devices. To the extent that our Rules have not kept pace with these changes, they need to be re-examined.”¹⁰³

Similarly, the Commission acknowledged the “inadequacy of our rules as they pertain to services such as the Dataspeed 40/4 offering . . .,” and reiterated that:

“It should be made clear that we consider the Dataspeed 40/4 offering as one which approaches the borderline between communications and data processing.”¹⁰⁴

The Commission further reflected its uncertainty concerning its decision not to reject the Dataspeed 40/4 tariff by asserting that its Order would have no precedential effect with respect to other equipment.¹⁰⁵

Thus, the Dataspeed 40/4 Order all but conceded that substantial issues had been raised which the Commission simply chose not to confront. In view of the Commission’s admitted uncertainty as to how to characterize the Dataspeed 40/4 and as to the adequacy of the rules and

¹⁰² Common Carrier Bureau Order, at 7-8, II J.A. 650-51

¹⁰³ Dataspeed 40/4 Order, 62 F.C.C.2d at 30-31, III J.A. 981.

¹⁰⁴ *Id.*, 62 F.C.C.2d at 31, III J.A. 982.

¹⁰⁵ *Id.*

policies it purported to apply, the Commission's failure to hold a hearing to investigate these questions before issuing a final order permitting the tariff to go into effect was a plain abdication of its statutory functions. *See Moss v. CAB*, 430 F.2d 891, 900-02 (D.C. Cir. 1970).

Chairman Wiley's Concurring Statement reflected his awareness that the Dataspeed 40/4 Order did not "squarely address" the "real issues" raised as to the legality of the tariff. The Chairman cogently observed:

"The case is obviously a close one. Sound arguments can be advanced in support of either proposition . . .

". . . I . . . would have considerable difficulty in concurring in my colleagues' conclusions that the Dataspeed 40/4 is a communications terminal if I thought this was but the first in a long line of ad hoc judgments on the road to addressing the real issues raised by data terminals. This is, of course, not going to be the case. At my suggestion, the Commission is preparing to enlarge its pending revisitation of the Computer Inquiry to squarely address the fundamental problems posed by the trend towards distributed data processing and the integration of communications and processing functions in a single device . . .

*". . . [O]ur action today is inevitably subject to the outcome of the overall inquiry and rulemaking. Thus, this decision should be viewed as a conclusion of transitory import."*¹⁰⁶

¹⁰⁶ Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33-34, III J.A. 985-87 (emphasis added). Commissioner Washburn in his "Separate Statement" similarly registered his concern, stating:

"Hopefully, at the end of the Inquiry we will have a clearer definition (taking into account latest technological advances) of the basic distinguishing characteristics of both data processing machines and terminal communications devices." 62 F.C.C.2d at 34, III J.A. 988.

Presumably because the Commission shared the Chairman's concern, the Dataspeed 40/4 Order stated that the pending rulemaking proceeding in *Computer Inquiry II* would be expanded to include the issues raised by the Dataspeed 40/4 and that the Dataspeed 40/4 Order was "subject to any further determination" in *Computer Inquiry II*.¹⁰⁷ The Commission's decision to investigate the Dataspeed 40/4 tariff in *Computer Inquiry II* after issuing a final Order permitting the tariff to go into effect constitutes a clear acknowledgement of the need for an investigation before the issues raised by the Dataspeed 40/4 are resolved on a fully reasoned and informed basis.

The Commission's acceptance of the Dataspeed 40/4 tariff in these circumstances without so much as a hearing is little short of reckless. At the very least, the Commission should have suspended the Dataspeed 40/4 tariff for one day—thereby withholding its final imprimatur—and consolidated an investigation of its lawfulness with the *Computer Inquiry II* proceeding.¹⁰⁸ Despite acknowledging that significant questions remain unanswered, the Dataspeed 40/4 Order does not give any assurance that the Commission will reject the Dataspeed 40/4 tariff in the event the results of *Computer Inquiry II* are inconsistent therewith. The murky statement that the Dataspeed 40/4 Order is "subject to any further determination" in *Computer Inquiry II* must be read against the statement that the Order is a final decision with respect to the device at issue.¹⁰⁹

¹⁰⁷ Dataspeed 40/4 Order, 62 F.C.C.2d at 31, 32 n. 23, III J.A. 982, 983. On March 8, 1977, in its Supplemental Notice the Commission accordingly expanded the scope of its Notice of Inquiry in *Computer Inquiry II*.

¹⁰⁸ Such one-day suspensions are a common practice of the Commission, in conjunction with the initiation of an investigation. See note 24 *supra*.

¹⁰⁹ Dataspeed 40/4 Order, 62 F.C.C.2d at 31, III J.A. 982.

If any additional proof were necessary to establish the arbitrariness of the Commission's failure to order a hearing in this case, the Commission's recently issued Supplemental Notice of Inquiry in *Computer Inquiry II* supplies it. The Supplemental Notice, issued a scant three months after the Dataspeed 40/4 Order, expands the scope of *Computer Inquiry II* as the Dataspeed 40/4 Order said would be done. The Supplemental Notice's proposed treatment of the issues concededly raised in the Dataspeed 40/4 case impeaches in significant respects the Commission's Order in that case.

The Supplemental Notice proposes an approach to defining "data processing" quite different from the Commission's Dataspeed 40/4 analysis. First, the Supplemental Notice recognizes that the "new technology may . . . have rendered meaningless any real distinction between 'terminals' and computers."¹¹⁰ Second, the Supplemental Notice recognizes that in defining a service which combines data processing and communications elements, it is appropriate to focus on the "activity" as a whole, which is defined as "the aggregate end result of a combination of operations, no matter where performed."¹¹¹ Third, the Supplemental Notice recognizes that "arithmetic processing" and "word processing" activities (such as those performed by the Dataspeed 40/4 in conjunction with a CPU) are "by their nature" data processing activities. Thus, it appears that the investigation the Commission is now undertaking but should have ordered in the Dataspeed 40/4 case may lead to a result distinctly inconsistent with the Dataspeed 40/4 Order.¹¹²

¹¹⁰ Supplemental Notice, at 5.

¹¹¹ *Id.* at 10-11, n.19.

¹¹² *Id.* at 10. The Supplemental Notice is, of course, merely a proposal; it does not finally establish Commission rules. Indeed, the Commission's call for comments on this latest set of proposed definitions (Supplemental Notice, at 11-13) demonstrates the ex-

Since the Commission does not offer any explanation for its failure to grant IBM's and CBEMA's request for an investigation, this Court is left to surmise as to the Commission's reasons for concluding that a hearing was not necessary. It is a cardinal tenet of administrative decisionmaking that an agency must set forth specifically the reasons for any denial of requested relief. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *Greater Boston Television Corp. v. FCC*, 444 F.2d at 851. As the courts have often observed:

"[I]n order for a court to exercise in any meaningful way its function of review, it is necessary that the Commission state specifically the basis for each of its conclusions." *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968).

See *Environmental Defense Fund Inc. v. Environmental Protection Agency*, 465 F.2d 528, 539 (D.C. Cir. 1972) ("... the specific decision must be explained, not merely explainable, in terms of the ingredients announced" by the agency); *Meadville Master Antenna, Inc. v. FCC*, 443 F.2d 282, 289-90 (3d Cir. 1971); *Community Service, Inc. v. United States*, 418 F.2d 709, 717 (6th Cir. 1969). The decision not to suspend and investigate the Dataspeed 40/4 tariff does not meet these standards and should be reversed.

tent to which the Commission's policies in this area remain in a state of flux. See *Greater Boston Television Corp. v. FCC*, *supra*; page 23 *supra*.

CONCLUSION

For the foregoing reasons, the Commission's Order should be reversed with directions to reject the Dataspeed 40/4 tariff as unlawful. In the alternative, the Commission should be directed to suspend the tariff and conduct a full investigation of its lawfulness pursuant to Section 204 of the Communications Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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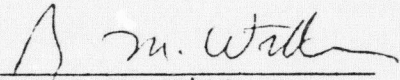
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